JD–05–04
Boston, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE CARNEY HOSPITAL, INC.

and Case 1–CA–38280

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 285, AFL-CIO

Kathleen McCarthy, Esq.,
for the General Counsel.
Geoffrey P. Wermuth, Esq.,
(Murphy, Hesse, Toomey
& Lehane, LLP),
Boston, Massachusetts,
for the Respondent.

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Boston, Massachusetts, on September 22 and 23, 2003, upon a complaint issued on May 17, 2001. The Service Employees International Union, Local 285, AFL-CIO (the Union) filed the underlying charges. The complaint alleges that The Carney Hospital (the Respondent or the Hospital) violated the National Labor Relations Act (the Act) by suspending an employee because of his union and protected concerted activities and by making threats, engaging in surveillance, interrogating employees about their union sympathies, implying that selection of a collective bargaining representative would be futile, and maintaining certain policies in its employee handbook regarding solicitation/distribution, and confidentiality.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

[1] At the start of trial, I granted the General Counsel's unopposed motion to amend the complaint to delete the allegation in paragraph 7(d) and alter paragraph 7(a) to address a change in one of the challenged policies. Transcript (Tr.) 6-7, 10-11; General Counsel's Exhibit (GC Exh.) 1Y.

Findings of Fact[2]

I. Jurisdiction

The Respondent, a corporation, operates a hospital in Dorchester, Massachusetts, where it annually derives gross revenues in excess of $250,000, and purchases and receives goods valued in excess of $5000 from points outside the Commonwealth of Massachusetts. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Respondent operates a full-service community hospital that has approximately 1350 employees. The Respondent's service and maintenance employees are not represented by a union for collective bargaining purposes and, in 2000, the Union began a campaign to represent those employees. Union supporters distributed pro-union leaflets and other materials to employees and wore buttons with pro-union slogans. The Hospital responded with an antiunion campaign that included distributing written materials and having officials talk directly to employees about unionization.

The representation election was held on April 27, 2000. A majority of eligible voters who cast ballots, voted against designating the Union as their collective bargaining representative. On May 4, 2000, the Union filed objections to the conduct of the election and to conduct affecting the results of the election. A hearing regarding the objections was held on 5 days beginning June 14. On August 14, the hearing officer issued a report stating that the evidence showed the Respondent had engaged in improper interrogations, surveillance, threats and promises, and had made statements implying that it would be futile for the employees to unionize. On May 3, 2003, the Board issued a decision in which it adopted the hearing officer's findings and recommendations, set aside the election, and ordered a new election.[3]

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[2] The General Counsel's unopposed motion to correct the transcript, dated November 10, 2003, is granted and received in evidence as GC Exh. 13.

[3] At trial, the General Counsel moved to restrict the presentation of evidence regarding the section 8(a)(1) allegations in paragraphs 7(c), (e), (f), and (g) of the complaint on the basis of collateral estoppel. The General Counsel argued that since the Board had determined during the objections proceeding that the conduct alleged in those paragraphs had occurred, the Respondent was not at liberty to relitigate the issue. The Respondent opposed the motion. I declined to limit the presentation of evidence and took the question of the applicability of collateral estoppel under advisement. I now conclude that application of collateral estoppel is not appropriate here. As the Respondent points out in its brief, the decisions in *McEwen Mfg. Company*, 172 NLRB 990, 991 fn.6 (1968), enfd. 419 F.2d 1207 (D.C. Cir. 1969), cert. denied, 397 U.S. 988 (1970) and *Viking of Minneapolis*, 171 NLRB 1155, fn.1 (1968), hold that the Board's findings and conclusions with respect to conduct alleged as objectionable in a representation proceeding are not binding in a subsequent proceeding where such conduct is alleged to violate section 8(a)(1) or (3). *McEwen* and *Viking* also preclude me from granting "persuasive relevance" to findings made in the prior decision regarding the election objections. That is what the trial examiner did in *Viking*, and the Board held that such reliance was in error. 171 NLRB at 1155 fn.1 and 1172-73. See also *Allen-Stone Boxes, Inc.*, 252 NLRB 1228

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B. Respondent's Campaign Against Union

Officials of the Respondent met with employees in an effort to persuade them not to support the Union. In one instance, Geraldine Geary, the Respondent's director of medical records, walked out of the hospital building and approached Kathleen Heffel, a clerk in the medical records department, while Heffel was distributing prounion leaflets outside the building prior to the start of her shift. Geary is not Heffel's direct supervisor, but Heffel's supervisor, Noreen Cahill, reports to Geary. Geary asked Heffel to give her one of the leaflets, and Heffel did so. After receiving the leaflet, Geary asked Heffel if she thought what she was doing was "a good thing." Heffel replied that she thought it was "a very good thing." Geary repeated her question, and Heffel affirmed that she thought she was doing a "good thing." Geary asked why Heffel believed this, and Heffel answered. Geary and Heffel continued to talk about issues relating to the organizational campaign. The exchange lasted about 20 minutes and during that time Heffel had to maneuver around Geary in order to hand the leaflets to passing employees, and generally found it more difficult to distribute the leaflets. After the conversation, Geary walked back into the hospital building.

In another instance, this one on Sunday, April 16, 2000, Carol Krzywda, clinical manager, went to the Hospital for the purpose of discussing the Respondent's position regarding the Union with employees. One employee who Krzywda met with that day was Morna Mashrick, a certified nurse's aide/student nurse[4] who Krzywda supervised. Krzywda asked Mashrick to come to her office. When the two were alone in Krzywda's office, Krzywda asked Mashrick "What do you think about [the Union campaign]?" Mashrick responded, that she thought "it's great," and that "a union is great" based on what she heard "about it at school and what I know." Krzywda asked, "[I]s that how you're going to vote?" and Mashrick answered, "I'm going to vote yes."[5] Krzywda adopted an angry demeanor, and asked Mashrick "why would

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(1980) and *Eidal International Corp.*, 224 NLRB 911, 913 (1976). In its brief, the General Counsel alludes to the general requirements for collateral estoppel, see *Fayette Electrical Cooperative*, 316 NLRB 1118, 1119 (1995) ("'[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim'"), but does not cite any authority that reverses or questions the holdings of *McEwen* and *Viking*. There is, I believe, a serious question as to whether permitting relitigation under the circumstances presented here is consistent with either the general standards for application of collateral estoppel or the policy of invoking that doctrine to prevent "the expense and vexation attending multiple lawsuits, conserve[ ] judicial resources, and foster[ ] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. U.S.*, 440 U.S. 147, 153-54 (1979). However, in light of the existing Board precedent on the precise issue presented here, those concerns are for the Board to evaluate, not me. See *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981) (administrative law judge bound to apply established Board precedent that neither the Board nor the United States Supreme Court has reversed).

[4] The next month Mashrick completed her nursing studies. She became a registered nurse in August 2000.

[5] A the trial in this matter, Mashrick initially testified that Krzywda posed two questions regarding her vote – first asking if Mashrick knew how she was going to vote, and then asking Mashrick what her vote was going to be. In the prior hearing on the objections, Mashrick gave a slightly different account. There Mashrick testified that Krzywda asked her if "that" was how she going to vote – meaning consistent with the favorable view of unions that Mashrick had just expressed – and that she responded "I'm going to vote yes." During cross-examination in the

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you want to do that?" Mashrick responded that she had heard "that workers usually had better circumstances after a union came in." At this point Krzywda began to convey unfavorable opinions about unions to Mashrick, and did not allow Mashrick an opportunity to respond. Regarding bargaining with the Union, Krzywda told Mashrick that "just because a union comes in . . . doesn't mean . . . that we would go to the table at all." She stated that the Respondent "might not even go to the table." On the subject of the benefits received by employees, Krzywda stated that if the Respondent did bargain, she could "guarantee you're going to lose something." She asked if Mashrick thought she "would get what [she] got now," have the schedule she wanted, and as much vacation as employees currently received. Krzywda told Mashrick that she had bent "over backwards" to meet Mashrick's scheduling and professional development needs, and asked Mashrick whether she thought "anybody who gets off a plane from Washington, D.C.," was going to "care about" her the way Krzywda herself did.

Krzywda discussed strikes at one or more other hospitals, and warned Mashrick that the Respondent would not be able to survive a strike. Krzywda had a number of documents that related to the Respondent's position with respect to the Union. Mashrick did not want to take these documents, but felt that Krzywda would not permit her to leave without doing so. The meeting lasted 10 to 20 minutes. This was the first and only time that Krzywda met with Mashrick one-on-one during Mashrick's 10 months working for the Respondent, and also the only time that Mashrick saw Krzywda at the Hospital on a Sunday. Prior to the meeting, Krzywda had never seen Mashrick openly proclaiming support for the Union, and did not know what Mashrick's position was regarding the organizational campaign. Mashrick testified that she was concerned that her prounion responses to Krzywda's questions had negatively affected the chances that the Respondent would hire her as a licensed nurse after she completed her degree. Mashrick never applied for such employment with the Respondent.[6]

Willie Foxworth is a buyer for the Respondent's pharmacy, and has been an employee of the Respondent's since 1997. He was one of the Union's most active and open supporters during the campaign. Kathleen O'Brien, Foxworth's supervisor, was aware of his prounion views. During the organizational campaign, O'Brien would talk to Foxworth about the materials that the Respondent distributed as part of its campaign to oppose unionization. On one occasion, O'Brien showed Foxworth a booklet and told him that the highlighting in it indicated how many times the listed unions had gone on strike. Foxworth asked, "How do you know

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instant matter, Mashrick stated that she believed the account she gave during the objections proceeding was the more accurate one. In light of Mashrick's adoption of the prior testimony, I credit that account over the slightly different one she initially gave during the trial before me. Based on Mashrick's demeanor and testimony I believe that the subtle differences in her accounts regarding Krzywda's questioning are innocent and do not detract from her overall credibility.

[6] Mashrick and Krzywda both testified regarding this meeting. Regarding disputed elements of the meeting, I, like the hearing officer in the objections proceeding, found Mashrick the more credible witness. Mashrick testified in a forthright and certain manner and her account of the meeting was quite specific. Krzywda, on the other hand, stated that she had no specific memory about a number of key points. See, e.g., Tr. 129 (does not "recall specifically" what she told Mashrick would happen regarding bargaining if the Union came in); Tr. 131 (does not "recall specifically" any discussions about employees' job security). Moreover, I believe that Krzywda was somewhat evasive. She claimed that when she talked to employees she was not trying to discourage them from voting for the Union and that she was not concerned how they would vote, Tr.136, but it is clear from the record that discouraging employees from voting for the Union was exactly the reason that she came to the Hospital on a Sunday to talk to employees.

we're going to go on strike just because we get the Union in?" O'Brien responded, "[W]hat happens . . . is you go to a bargaining table, and in order for you to get some of the things you want you're going to have to give up something." She listed a number of benefits that employees might lose and said, "[the Respondent's president] is not going to give you what you want without taking something away." O'Brien stated that employees "might gain something," but were "definitely going to lose something." She told Foxworth that if employees went to the bargaining table and did not get what they wanted, "that's how the strike occurs."

Among the written materials that the Respondent distributed to employees was a booklet called "The Decision is Yours." The following language appeared in that booklet:

> *What Happens If The Union Wins?*
>
> After objections (if any) regarding the election are filed with the National Labor Relations Board and resolved, bargaining for a first contract begins and it can be a long, complicated and technical process which can go on *for weeks, months, a year . . . or longer.*
>
> While bargaining goes on, wages and benefit programs typically remain *frozen* until they are changed, if *at all*, by a contract.
>
> If the union wins, *you* take the risks . . . *you* will have to "wait and see" if *anything* happens with wages and benefits. *The union, however, may begin colleting dues from you right away.*

(Emphasis In Original). In the booklet, the Respondent told employees that it believed "the union's interest in you is prompted by its need for union dues rather than by any union commitment to ensure the job security of individuals." The booklet was dated April 27, 2000, and distributed to employees on, or about, that date.

C. Rules in Employee Handbook

The Respondent maintains an employee handbook. From at least April 1, 2000, until June 30, 2003, the handbook included a rule on solicitation and distribution, which stated:

> Persons not employed by the Hospital may not solicit or distribute literature on Hospital property for any purpose at any time. Employees may not solicit for any purpose during working time in treatment, surgery, examination, admitting rooms, or other patient care areas. Employees may not distribute literature during working time, or at any time in working or patient care areas.
>
> Solicitation or distribution to patients and visitors is prohibited at all times. Employees who participate in unauthorized solicitations or distributions are subject for [sic] disciplinary action.

On June 30, 2003, the Respondent amended its employee handbook to delete the second paragraph quoted above.

Since at least April 1, 2000, the handbook has contained a confidentiality provision that states:

> Disclosure of confidential information gained through your employment by the Hospital is considered an act of prohibited conduct subject to formal disciplinary action. Any information concerning a patient's illness, family, financial condition or personal

> characteristics is strictly confidential. When a patient's history or condition is reviewed, it must be done in privacy with only those persons involved with the care of the patient. Any other information coming to you in the course of your work concerning another person or employee is also considered confidential and may not become the topic of conversation with others.

On about June 30, 2003, the Respondent amended the confidentiality provision by adding the following language:

> This Confidentiality Information Policy should not be interpreted to prohibit employees from discussing the terms and conditions of their employment in an appropriate manner.

According to the uncontradicted testimony of Mary Orlandi, the Respondent's human resources manager, no employee has ever been disciplined under the confidentiality policy for discussing issues relating to wages, benefits, and other terms and conditions of employment.

Copies of the Respondent's employee handbook are maintained in supervisors' offices and issued to new employees. Amendments to the handbook are maintained in department managers' offices and posted on department bulletin boards. The record does not show how long the amendments remain posted, or whether the department bulletin boards are the places where notices to employees are customarily posted. The record also does not show whether the handbooks that were distributed to new employees after June 30, 2003, incorporated, or gave notice of, the two amendments discussed above.

D. Suspension of Willie Foxworth

1. Foxworth and Olivier

As noted above, Foxworth was one of the Union's most active and open supporters during the organizing campaign in 2000. He wore buttons with prounion messages and permitted the Union to use his picture on some of its campaign material. He served as an informal liaison between employees and union officials regarding questions about union representation. The Union designated him as one of its official observers at the April 27 election. After the election, Foxworth signed an open letter urging his co-workers to come forward with objections to the Respondent's campaign against the Union. He testified for the Union on June 14 and 15 at the objections hearing. The Respondent's human resources manager, Mary Orlandi, stated that she was aware of Foxworth's prounion sympathies and activity. Orlandi testified that prior to June she had no cause to believe that Foxworth was a problem in the workplace and that she found him a cordial and respectful employee. Indeed, Foxworth had never been disciplined by the Respondent prior to June 2000.

On June 9, 2000, Orlandi informed Foxworth that he was suspended without pay for a period of 3 days – from June 12 through June 14. The suspension was imposed only 5 days before Foxworth was to testify in the objections hearing regarding the representation election. Orlandi was the official who made the decision to suspend Foxworth. According to Orlandi, the reason she decided to suspend Foxworth was that he had threatened another employee, Lionel Olivier. Olivier was an employee who had worked to defeat the organizational effort, but he was not part of the proposed bargaining unit, or, at the time of the election, of management.[7] The Respondent sometimes summoned employees away from their work assignments so that

[7] Later, in April 2001, the Respondent promoted Olivier to a management position.

Olivier could talk to them about the Union. During the April 27 election, Olivier was one of the Respondent's official observers.

The first indication that the record provides of friction between Olivier and Foxworth involves an incident that took place while votes were being cast in the representation election. Olivier complained to a Board agent that Foxworth was outside the door to the voting area pressuring employees to vote in favor of the Union. The Board agent talked to Foxworth, and Foxworth denied Olivier's accusation. Foxworth testified that what the Board agent discovered was that Foxworth was waiting for an elevator and talking to his brother-in-law. The Board agent apparently took no further action regarding the accusation against Foxworth, despite Olivier's continued protestations.

The verbal exchange that Orlandi offers as the primary reason for suspending Foxworth is supposed to have occurred on June 1. According to what Olivier told Orlandi, Foxworth passed him on the way into the cafeteria and told him "You're going to get it."[8] Foxworth gave a significantly different account. He told Orlandi that what he had said was "it's about that time," meaning time for breakfast, and that he directed this comment to others, not Olivier. He denied threatening Olivier. At trial, Foxworth testified that he continued into the cafeteria and that Olivier then came to the door and asked him "What do you mean it's about that time." According to Foxworth, he repeated, "It's about that time," and did not elaborate. Foxworth testified that "it's about that time" is phrase he routinely uses when inviting co-workers to join him in the cafeteria for a meal.

Aside from Olivier and Foxworth, there were two witnesses to the incident – Lynnette Samuel and Dale Jeffries. Orlandi interviewed both of these witnesses, but even according to Orlandi neither Samuel nor Jeffries corroborated Olivier's account. Samuel, who Olivier counted as a "good friend," reported that what Foxworth had said was, "I think it's about that time" and that she initially thought Foxworth was speaking to her. Jeffries stated that Foxworth had said "[I]t's time," and that Olivier asked, "What did he say to me?" Jeffries told Orlandi that he considered the matter "petty." The Respondent does not claim that either Samuel or Jeffries reported that Foxworth had said anything like "You're going to get it," or had otherwise threatened Olivier. Orlandi also received a copy of a police report regarding a complaint that Olivier filed with the Boston Police. According to that report, Olivier told the police that Foxworth

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[8] At trial, Orlandi offered three versions of what Olivier accused Foxworth of saying. First she testified that Olivier told her Foxworth pointed at his watch and said, "It's about that time." Next, Orlandi testified that Olivier reported the following, clearly more threatening, statement: "It's about time. It's your time; you're going to get it." Then, after reviewing the notes she made of her interview with Olivier, Orlandi testified that what Olivier accused Foxworth of saying was simply, "You're going to get it."

I did not find Orlandi a very credible witness. Based on her demeanor and testimony I believe that she tried to shade her testimony on key matters to place the Respondent's action in a favorable light. As noted above, she provided three different versions of the language that Olivier complained of – the result of her effort, I believe, to make that language sound as threatening as possible, without bringing Olivier's account into irreconcilable conflict with the accounts of the two disinterested witnesses to the verbal exchange. There were other inconsistencies. First Orlandi testified that Olivier told her he had reported an earlier incident involving Foxworth to security, Tr. 156, but then she testified that she did not recall Olivier telling her that, Tr. 188-89. I also found implausible Orlandi's claim that she believed Olivier would have heard, from outside an elevator, the content of threats Foxworth supposedly made inside an elevator after the doors closed and the elevator pulled away.

said "it was that time" in a threatening manner. There is no mention in the police report of Olivier claiming that Foxworth had said that Olivier was "going to get it." The police never contacted Foxworth about Olivier's allegation.

Despite the fact that two witnesses, and the police report, essentially corroborated Foxworth's version of what he said to Olivier, Orlandi testified that she decided Foxworth had "absolutely no credibility." Instead she credited Olivier's account, which was corroborated by no one. At trial, Orlandi claimed that the reason she did not find Foxworth credible was that he did not appear to be taking the matter seriously. As to why she did not give much weight to Samuel's and Jeffries' statements corroborating elements of Foxworth's account, Orlandi stated that she believed they were reluctant witnesses and were not telling all that they knew about the incident. Even if one accepts Orlandi's claim that the two appeared reluctant,[9] Orlandi provides no basis for believing that whatever they may have been holding back would have been unfavorable to Foxworth. Based on Orlandi's demeanor and testimony, I believe that the reason Orlandi concluded the two witnesses were withholding information was that she wanted to credit Olivier's account, and therefore was determined to view any witness whose account failed to conform to Olivier's as less than reliable.

Although Orlandi said that the cafeteria incident was the main reason for the suspension, she testified that she also considered a threat that Olivier reported several weeks earlier. According to Olivier, he was on an elevator with Foxworth and Tim Durkey. When it reached Olivier's floor, he stepped off, leaving only Foxworth and Durkey inside the elevator. Olivier states that as the doors closed and the elevator moved away, he could hear Foxworth say to Durkey, "I know he's your boy, and I'm going to get him." Orlandi looked into this accusation by interviewing Olivier and Durkey. Durkey corroborated Olivier's account. Orlandi testified that she had no reason to believe that Durkey was a personal friend of Olivier's. However, the record shows that Durkey and Olivier were personal friends who socialized together outside of work and played darts together at Olivier's home.[10] Although Orlandi met with Foxworth before suspending him, she did not ask him anything about the threat he allegedly made on the elevator. Indeed, although Orlandi viewed the elevator incident as significant enough to play a part in the decision to suspend Foxworth, she testified that she did not believe it was necessary to give Foxworth an opportunity to tell his side of the story. At trial, Foxworth denied that the elevator incident had occurred.

Foxworth testified, as scheduled, at the objections hearing in June 2000. During its cross-examination of Foxworth at that hearing, the Respondent introduced the suspension into evidence in an effort to undermine Foxworth's credibility.

2. Comparator Evidence

When Orlandi called Foxworth to inform him that he was suspended, Foxworth asked if any discipline would be imposed on Olivier. Orlandi responded that no complaint had been filed against Olivier. Subsequently, Foxworth made a complaint in which he stated that Olivier had threatened him. Foxworth stated that he had not heard these threats directly, but he gave Orlandi the names of two witnesses to the alleged threats – one a current security officer and the other a former employee who was Foxworth's brother-in-law. Orlandi told Foxworth that he

[9] Neither Samuel nor Jeffries was called to testify at the trial in this matter.

[10] At trial, Olivier was asked whether he and Durkey were friends. At first Olivier responded, evasively, that they were just "co-workers." Upon further questioning he conceded that they socialized outside of work and that Durkey came to his home to play darts.

had to submit his complaint in writing – a requirement she had not applied to Olivier's complaints against Foxworth.[11] Orlandi asked Foxworth why he had not brought up the allegations earlier, and she testified that Foxworth's response was, in her view, unsatisfactory. Orlandi told Foxworth that she would look into his complaints, but she never did. Orlandi conceded at trial that she made no effort to contact either of the two witnesses Foxworth identified. When Foxworth asked Orlandi about the status of his complaint, she told him she had concluded there was "no validity" to his claim. Orlandi testified that she did not feel she needed to look into Foxworth's allegations against Olivier because it was clear to her those allegations were an "afterthought" that Foxworth was just trying on "for size."

The Respondent's disciplinary policy provides that a 3-day suspension is the appropriate penalty when one employee threatens another. The policy also states, however, that the Respondent has the discretion to depart from the discipline listed. Orlandi acknowledged that she possessed that discretion and that she had sometimes exercised it to impose lesser discipline, such as a written warning, when one employee threatened another. According to Orlandi, the discipline she imposed depended on "the level of threat involved." She testified that in some cases when two employees were at odds she had called the employees together and tried to help them work out their differences, rather than imposing any discipline at all. Orlandi agreed that she had not made this effort in the case of the conflict between Foxworth and Olivier.

The record establishes a number of instances in which employees who engaged in conduct similar to Foxworth's were given lesser discipline.[12] One such incident involved an employee, ED, who made threatening, inappropriate, statements to a co-worker and received only counseling and a written warning as punishment. Another employee, RM, had been verbally abusive towards her supervisor, but Orlandi merely told this employee to return to work and encouraged her to meet with both the supervisor and Orlandi to "iron this out."[13] The employer concluded that another employee, FM, was making graphic comments to, and otherwise sexually harassing, a female co-worker. The Respondent did not suspend FM for that intimidating conduct, but rather gave him a written warning.[14] Another employee, AS, had numerous documented confrontations with employees and patrons before the Respondent considered his threatening conduct serious enough to warrant a suspension. The record also reveals a number of instances in which the Respondent imposed discipline comparable to that it imposed on Foxworth for conduct similar to what it attributes to Foxworth. For example, one employee, BM, received a 3-day suspension because he threatened one of the Respondent's cafeteria cashiers during a dispute over paying for his food. Another employee, LM, received a 3-day suspension after he threatened to make a co-worker's "life miserable," and to "settle this" before the end of the shift. Another employee, OE, was given a 3-day suspension for making inappropriate comments that the Respondent considered sexual harassment.

E. The Complaint Allegations

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[11] Olivier testified that his complaints to the Respondent about Foxworth were not made in writing.

[12] At trial, I granted the Respondent's unopposed motion to refer to these "comparator" employees only by their initials.

[13] The Respondent did not discipline RM until she violated Orlandi's instructions by refusing to return to work and leaving the Hospital without notice to her superiors.

[14] Harsher discipline was not imposed until after FM continued his harassment of the co-worker in contravention of the Respondent's explicit order that he "stay away" from her.

The complaint alleges that the Respondent interfered with, restrained, and coerced employees in violation of Section 8(a)(1) of the Act: when its agent Geary engaged in surveillance of employees' union activities; when its agent Krzywda interrogated employees, threatened employees with loss of benefits and job loss, and implied to employees that selecting the Union as their collective-bargaining representative would be futile; when O'Brien, the Respondent's agent, threatened employees with loss of benefits; when the Respondent distributed a document to employees that implied that they would lose benefits if they voted for the Union; and by maintaining an overly broad confidentiality policy and overly broad policies regarding solicitation and distribution. The complaint also alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by suspending Willie Foxworth because of his union and concerted activities and thereby interfering with, restraining, and coercing employees in the exercise of their rights under Section 7 of the Act.

Analysis and Discussion

I. Section 10(b)

Paragraph 7 of the complaint alleges unfair labor practice violations based on the April 2000 events and the handbook provisions. The Respondent contends that the allegations contained in Paragraph 7 of the complaint are time-barred under Section 10(b) of the Act because they involve events that occurred more than 6 months before the filing of the relevant amended charges. The Union filed the original charge in this case on June 29, 2000. That charge concerned only Foxworth's June 9, 2000, suspension. On April 19, 2001, the Union filed an amended charge which added allegations that in April 2000, during the weeks prior to the election, the Respondent engaged in unlawful threats, surveillance and interrogations, and made statements implying futility. On May 8, 2001, the Union filed a second amended charge, which added allegations that the Respondent maintained rules in its handbook regarding confidentiality and solicitation/distribution that unlawfully prohibited protected activity.

The provision of the Act regarding time limits on charge filing, Section 10(b), states in relevant part:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

Under this provision, allegations that involve events occurring more than 6 months prior to the filing of the charge are still considered timely if those allegations are "closely related" to the allegations made in a timely charge. *Seton Co.*, 332 NLRB 979, 985 (2000); *Nickles Bakery of Indiana,* 296 NLRB 927 (1989); *Redd-I, Inc.*, 290 NLRB 1115, 1116-18 (1988); see also *Ross Stores, Inc.*, 329 NLRB 573, 573 fn. 6 (1999) (the "closely related" standard applies both when the question is whether otherwise time-barred allegations in an amended charge relate back to the allegations of an earlier timely filed charge, and where the question is whether the allegations in a complaint are sufficiently related to those in a charge.) enf. denied in relevant part 235 F.3d 669 (D.C. Cir. 2001). In *NLRB v. Fant Milling Co.*, 360 U.S. 301(1959), the Supreme Court explained the basis for the "closely related" standard. The Court stated that the Board's role is "not to adjudicate private controversies but to advance the public interest," Id. at 308, and therefore the Board would not be "precluded from 'dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board,'" Id. at 309 quoting *National Licorice Co. v. Labor Board*, 309 U.S. 350 (1940). The purpose of the charge, the Court explained, is "merely to set

in motion the machinery of an inquiry," while "[t]he responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed on the Board." 301 U.S. at 307.

In the instant case, the Union's initial charge regarding Foxworth's suspension was filed on June 29 -- within 6 months of both Foxworth's suspension and the Respondent's alleged misconduct in April 2000. However, the Union did not amend the charge to discuss the April 2000 conduct until April 19, 2001 – well after the 6-month period expired – and, therefore, the allegations regarding the April 2000 conduct are untimely unless those allegations are closely related to the timely allegation regarding Foxworth's suspension. I conclude that, under the standards articulated by the Board, the allegations regarding the April 2000 conduct are closely related to the timely allegation, and therefore that the allegations in paragraphs 7(c), (e), (f), and (g) are not barred by Section 10(b).

The Board has considered the following factors when determining whether allegations are closely related: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances; and (3) whether the respondent would raise similar defenses to the allegations. *Nickles Bakery*, 296 NLRB at 928; see also *Redd-I, Inc.*, 290 NLRB at 1118. The Board has treated these as factors to guide analysis of the issue, not as *requirements* all of which must be met. The Board has held that the "closely related" standard is met when the allegations "involv[e] 'acts that are part of the same course of conduct, such as a single campaign against a union,' . . . and acts that are all 'part of an overall plan to resist organization.'" *Ross Stores*, 329 NLRB at 573 (internal citations omitted); see also *Office Depot, Inc*., 330 NLRB 640 (2000).[15]

Under these standards, the allegations regarding the Respondent's conduct in April 2000 are sufficiently related to those in the timely charge to survive the Respondent's Section 10(b) challenge. If Foxworth's suspension on June 9 was, as alleged, a response to his activities in support of the union campaign, that suspension would plainly be an extension of the same antiunion campaign that allegedly included the threats, surveillance, and other improper conduct in April 2000, about 2 months earlier. This is true even though the April 2000 conduct occurred before the representation election on April 27 since neither the Union's effort, nor the Respondent's opposition to it, ended with the election. Instead, the Union continued its campaign by filing objections to the election and convincing the Board to direct a new election.

[15] The Respondent argues that each factor is a requirement and that allegations are not "closely related" unless all three are satisfied. Respondent's Brief at Page 11. That is not the Board's view. In *Nickles Bakery*, the Board indicated that the third factor is permissive – stating that "the Board *may* look at whether a respondent would raise similar defenses to both allegations." 296 NLRB at 928 (emphasis added). In *Redd-I*, the Board's discussion indicated that allegations could be found closely related as long as they involved "the same subject matter and sequence of events." 290 NLRB at 1116, quoting *Douds v. Longshoremen*, 241 F.2d 278, 284 (2d Cir. 1957). More recently, the Board has applied *Nickles Bakery* and *Redd-I*, and held that allegations are closely related as long as they allege unfair labor practices that were committed as part of a single antiunion campaign. *Precision Concrete*, 337 NLRB No. 33, slip op. at 1 fn.5 (2001), enf. denied in relevant part 334 F.3d 88 (D.C. Cir. 2003); *Office Depot, Inc*., supra; *Ross Stores*, supra. In support of the contrary view, the Respondent relies on *Nippondenso Mfg. U.S.A., Inc.*, 299 NLRB 545 (1990). Not only is *Nippondenso* contrary to the weight of prior Board precedent and the Supreme Court's rationale in *Fant Milling*, supra, but the Board has explicitly repudiated it in relevant part. See *Office Depot*, 330 NLRB at 640; *Ross Stores*, 329 NLRB at 574-75.

The Respondent's opposition to the post-election campaign by the Union is within the sweep of a single, continuous, effort by the Respondent to defeat the Union. Since the April 2000 allegations and those in the timely charge regarding Foxworth's suspension "are part of . . . a single campaign against the Union" those allegations are closely related under the Board precedent cited above.

The Board has recognized that its view that unfair labor practices are sufficiently related as long as they arise out of the same antiunion campaign has not found favor with the U.S. Court of Appeals for the D.C. Circuit, but the Board has chosen to adhere to its own standard. *Precision Concrete*, 337 NLRB No. 33, slip op. at 1 fn.5. I, in turn, am bound by Board's view since it has not been reversed by the Supreme Court or the Board itself. See *Los Angeles New Hospital*, 244 NLRB at 962 fn. 4. In any case, I am convinced that the Board's current position is consistent with *Redd-I* and *Nickles Bakery*, as well as with the policy concerns set forth by the Supreme Court in *NLRB v. Fant Milling Co.*, 360 U.S. at 307-09. Moreover, I conclude that the amendment to the charge satisfies the "closely related" requirement even when each of the three factors identified in *Nickles Bakery* is considered individually. The first factor is whether the allegations involve the same legal theory. In the instant case, both the amendment regarding the Respondent's April 2000 conduct and the timely charge regarding Foxworth's suspension allege the same legal theory – i.e., that the Respondent engaged in animus-motivated efforts to defeat the Union campaign.[16] Indeed, the allegations regarding threats, interrogations, and so forth, would, if proven, help to establish the animus the General Counsel is required to show as part of its case regarding Foxworth's allegedly discriminatory suspension, and thus cannot reasonably be seen as less than closely related to that allegation. Second, the April 2000 allegations and the discriminatory suspension allegation arise from the same factual circumstances – i.e., the Respondent's antiunion campaign. Indeed, the Respondent's conduct in April 2000 is alleged to include an unlawful threat directed at Foxworth, the same individual who the Respondent is alleged to have unlawfully suspended two months later in June. Finally, the Respondent would likely raise some similar defenses to both allegations. As discussed above, it is predictable that the General Counsel would rely on evidence regarding the Respondent's April 2000 conduct in order to show that the Respondent harbored antiunion animus connected to Foxworth's suspension. Thus, in response to both the April 2000 allegations, and the allegation regarding Foxworth's suspension, the Respondent would be expected to defend, in part, by contending that the April 2000 conduct either did not occur, or that the conduct was not improper.

A decision to permit the General Counsel to pursue the April 2000 allegations is also consistent with the Supreme Court's rationale in *Fant Milling*, supra. In that case, the Court made clear that Section 10(b) should not be construed to interfere with the General Counsel's responsibility for shaping the inquiry "set in motion" by the charge, 360 U.S. at 307, and "'dealing adequately with unfair labor practices which are related to those alleged in the charge

[16] This factor does not require that both allegations invoke the same section of the Act. *Nickles Bakery*, 296 NLRB at 928 fn.5. At any rate, the complaint invokes the same provision -- Section 8(a)(1) – with respect to the Respondent's alleged April 2000 misconduct, and the allegedly unlawful suspension of Foxworth. The complaint alleges that both had the purpose of discouraging employees from engaging in protected activities. Of course, the suspension, unlike the April 2000 conduct, is alleged to be discriminatory in violation of Section 8(a)(3), but this does not negate the fact that both the April 2000 conduct and the suspension are also alleged to violate Section 8(a)(1). See *Flannery Motors, Inc.*, 321 NLRB 931 (1996) (in discriminatory discipline case, the Section 8(a)(1) violation is derivative of the Section 8(a)(3) violation), enfd. 129 F.3d 1263 (1997) (Table).

and which grow out of them while the proceeding is pending before the Board,'" Id. at 309. In this case, the Section 8(a)(1) allegations relating to the Respondent's campaign against the Union logically grow out of the Board's investigation of the charge regarding Foxworth's suspension, since the Board would reasonably investigate the Respondent's antiunion campaign for evidence of the type of antiunion animus required to establish that the suspension was discriminatorily motivated.

In *Redd-I*, supra, the Board also looked to principles of "fairness" to aide in the resolution of the Section 10(b) issue. There, the Board stated that it was not unfair to permit the allegations to go forward since the employer could not claim surprise or that "events" had "induced [it] not to preserve evidence." 290 NLRB at 1117. Here the Respondent also cannot claim such surprise, since it should have expected an inquiry into its campaign against the Union after receiving the charge regarding Foxworth's suspension. Moreover, even before the Union filed the initial unfair labor practice charge, the Respondent was made aware that its April 2000 conduct would be scrutinized by the Board, since the same conduct was cited by the Union in its May 4 objections to the Respondent's election conduct. Indeed, counsel for the Respondent made use of the transcript from the objections hearing during his cross-examination of one or more witnesses in the unfair labor practices trial before me.

The Respondent also argues that Section 10(b) bars the allegations that the Respondent violated the Act by maintaining certain rules in its handbook. Those rules were adopted more than 6 months prior to the filing of the May 8 charge, which first alleged that the rules violated the Act. This argument fails because the Respondent continued to maintain the challenged provisions during the 6-month period prior to the filing of the May 8 charge. Section 10(b) does not preclude the Board from finding that a provision or policy maintained by an employer is unlawful, even it was adopted more than 6 months prior to the filing of a charge, since such violations are continuing in nature. See *Teamsters Local 293*, 311 NLRB 538, 539 (1993), *Auto Workers Local 148 (McDonnell-Douglas)*, 296 NLRB 970, 977 (1989), *Sheet Metal Workers Local 73*, 274 NLRB 374, 375 (1985). This conclusion is unaffected even if the rules were not enforced during the charge-filing period since the mere existence of such a rule "tends to restrain and interfere with employees' rights under the Act, *even if the rule is not enforced*," *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (emphasis added); see also *Alaska Pulp Corp.*, 300 NLRB 232, 233-34 (1990), enfd. 972 F.2d 1341 (9th Cir. 1992) (Table).

II. Section 8(a)(1) Allegations

Geary

The General Counsel alleges that the Respondent violated Section 8(a)(1) by unlawfully surveilling union activity in April 2000 when Geary approached Heffel while the latter was distributing union literature to employees outside the Hospital's entrance. It is undisputed that Geary exited the Hospital in order to stand next to, and talk with, Heffel for approximately 20 minutes on that occasion, and that Geary found it more difficult to distribute literature to employees because of Geary's action. Geary was Heffel's second-level supervisor.[17]

The Board has held that "management officials may observe public union activity, particularly when such activity occurs on company premises, without violating Section 8(a)(1) of the Act, unless such officials do something out of the ordinary." *Arrow Automotive Industries*,

[17] The Respondent admits that Geary is its agent and a supervisor within the meaning of Section 2(11).

258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982) (Table). I conclude that the observation at issue here constitutes more than ordinary observation of public union activity and amounts to unlawful surveillance. The record indicates that Geary was not casually observing employees, but rather exited the hospital for the purpose of standing at Heffel's side while Heffel tried to distribute pro-union leaflets. Geary situated herself in such a way that Heffel had to maneuver around her to hand the leaflets to passing employees. Geary remained at Heffel's side for 20 minutes, the effect being that any employee who wished to take a leaflet from Heffel during that time would have to do so under the intrusive, close-up, scrutiny of Geary. This unusual physical proximity significantly heightens the coercive effect of Geary's observation. See *Flexsteel Industries*, 311 NLRB 257 (1993) (Under Section 8(a)(1), employees should be free to participate in union organizing campaigns without the fear that members of management are "peering over their shoulders."). Moreover, it meant that any communications, or questions, regarding the leaflets that employees wanted to raise with Heffel were at risk of being overheard by Geary. Geary's activities were out of the ordinary and had the tendency to unreasonably chill the exercise of employees' section 7 rights. *Fairfax Hospital*, 310 NLRB 299, 310 (1993), enfd. 14 F.3d 594 (4th Cir. 1993) (Table), cert. denied, 512 U.S. 1205 (1994). Under the circumstances, I am not surprised that Heffel found it more difficult to distribute leaflets to employees during Geary's visit.

My conclusion that Geary's surveillance violated Section 8(a)(1) is consistent with prior decisions in which the Board found that an employer's observation of public union activity was sufficiently "out of the ordinary" to constitute unlawful surveillance. In *Hoschton Garment Co.*, 279 NLRB 565, 566 (1986), the Board found that the Respondent had engaged in unlawful surveillance at a plant entrance when it "did not merely observe union activity, but rather attempted to prohibit [an employee] from distributing handbills to employees on public property, and that [the supervisor] stood very close to [the employee] for the duration of the handbilling." Similarly, in the instant case Geary stood close to Heffel during handbilling. Although Geary did not state that Heffel was prohibited from distributing the leaflets, she did something similar; she positioned herself in a way that made it physically difficult for Heffel to place the leaflets in employees' hands. Moreover, the intrusive observation by Geary, an upper-level supervisor, would predictably chill employees from taking the pro-union leaflets and discussing them, or the Union, with Heffel. In *Sands Hotel & Casino*, 306 NLRB 172 (1992), enfd. 993 F.2d 913 (D.C. Cir. 1993) (Table), the Board found that an employer violated the Act when guards observed public union activity using binoculars. In the instant case, Geary also took steps to get an intrusive, close-up, view of the public union activity, although she did this not through the use of a mechanical device, but rather by leaving the Hospital and standing at Heffel's side. If anything, Geary's physical presence was a more coercive and intimidating intrusion than that represented by the use of binoculars in *Sands Hotel.* In *Sands Hotel*, it was also noted that there was no evidence that the Respondent's "conduct was based on safety or property concerns." 306 NLRB at 172; see also *Arrow Automotive*, 258 NLRB at 861 (employer's surveillance of handbilling unlawful when it was not necessary to preserve the integrity of its property). Similarly, the Respondent did not show that it had a legitimate basis for the intrusive surveillance in this case. In *Days Inn Management Co.*, 306 NLRB 92, fn.3 (1992), the Board found that the employer had not engaged in unlawful surveillance, but only after noting that the employer: had not disrupted contact between employees and the union; was not able to overhear conversations between employees and the union; and had not attempted to talk to union representatives. In the instant case, those same factors weigh in favor of finding the surveillance unlawful. Geary interfered with Heffel's efforts to distribute leaflets by positioning herself so that Heffel had to maneuver around her in order to hand the leaflets to passing employees. From this same position, Geary would likely be able to overhear conversations that Heffel had with employees. During the time that Geary observed the union activity she questioned Heffel, an employee who she indirectly supervised, about her support for the union.

For the reasons discussed above, I find that, in April 2000, the Respondent engaged in unlawful surveillance of union activities in violation of Section 8(a)(1).

Krzywda

On April 16, 2000, Krzywda summoned one of her supervisees,[18] Mashrick, to come to her office for a one-on-one meeting. The General Counsel alleges that during that meeting Krzywda unlawfully interrogated and threatened Mashrick, and implied that it would be futile to choose the Union as collective bargaining representative.

During the incident in question, Krzywda asked Mashrick what her view was regarding the Union campaign and, after Mashrick revealed a favorable impression of unions, Krzywda asked whether Mashrick intended to vote consistent with that view. Mashrick said that she intended to vote in favor of the Union, and then Krzywda asked why Mashrick held a favorable view of unions. When Mashrick responded, Krzywda, appeared to become angry, and began communicating negative views about unions without allowing Mashrick to respond. An interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Matthews Readymix, Inc.*, 324 NLRB 1005 (1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 187 (1993); *Liquitane Corp.*, 298 NLRB 292, 292-93 (1990). Relevant factors include, whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18-19 (1995); *Rossmore House Hotel*, 269 NLRB 1176 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985). Based on these factors, I find that Krzywda's interrogation of Mashrick was unlawfully intimidating and coercive. The record did not show that Mashrick was a particularly open or active union supporter prior to the interrogation. Indeed, Krzywda stated she did not even know whether Mashrick supported the Union when she began to question her. The fact that Krzywda was Mashrick's supervisor also adds to the coercive character of the questioning. This is especially true since Mashrick was a student nurse who would soon qualify for a position as a registered nurse and therefore her future with the Respondent was uncertain. In addition, the interrogation took place only 11 days before the scheduled election, and against the backdrop of the Respondent's aggressive campaign to defeat the Union. As discussed below, in the same conversation during which Krzywda questioned Mashrick, she also threatened that unionization would result in loss of employment and benefits. The place and method of the interrogation further supports the conclusion that it was unlawfully coercive. Krzywda summoned Mashrick to her office, where, out of the presence of others, she posed her questions. A reasonable employee would find that setting to be intimidating. "In light of the totality of the circumstances" shown here, I conclude that Krzywda's interrogation unlawfully interfered with, restrained, and coerced Mashrick in the exercise of her Section 7 rights.

For these reasons, I find that on April 16, 2000, the Respondent interrogated Mashrick about her union sympathies in violation of Section 8(a)(1).

The General Counsel alleges that Krzywda also unlawfully threatened Mashrick with loss of employment and benefits. During the meeting with Mashrick, Krzywda discussed strikes that had occurred at one or more other hospitals where unions were present and told Mashrick that

[18] The Respondent admits that Krzywda is its agent and a supervisor within the meaning of Section 2(11).

the Respondent would not survive such a strike. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619 (1969), the Supreme Court found that an employer violated Section 8(a)(1) by conveying the message that the company was in a precarious financial position, that the union would likely strike to obtain its demands, and that the probable result of a strike would be the shutdown of the plant. The question when assessing this type of speech, the Court stated, is whether the employer's prediction is "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." 395 U.S. at 618; see also *Quamco, Inc.*, 325 NLRB 222, 223 fn. 6 (1996) (When employer "implies a prediction that the employer's plant will also close if the employees choose union representation, the employer must, as noted above, articulate an objective basis for the prediction."). The Respondent has presented no evidence that Krzywda's prediction that the Hospital would not survive a strike had any basis at all in objective fact. To support its contention that Krzywda did not unlawfully threaten loss of employment, the Respondent cites *Crompton Co., Inc.*, 272 NLRB 1121 (1984) – a case in which the Board found it was not a violation for an employer to disseminate accurate information about strikes that a union has engaged in at other facilities, including strikes that resulted in plant closings. However, Krzywda did something more than recount what had happened at other facilities. She predicted something that would happen at the Respondent – i.e., that the Hospital would go out of business if the Union went on strike to obtain its demands. Therefore, Krzywda's prediction is subject to the test set forth in *Gissel*, which, as discussed above, it fails.

The General Counsel alleges that Krzywda unlawfully threatened Mashrick with loss of benefits when she said "I can guarantee you're going to lose something" in bargaining and mentioned a number of examples of benefits, including favorable work schedules and the existing vacation benefit. An employer violates the Act when it makes a prediction to employees that they would necessarily lose benefits if they select a union when there is "no lawful explanation based on objective facts as to why such a loss of benefits would occur." *Poly-America, Inc.*, 328 NLRB 667, 669 (1999);[19] see also *Dico Tire, Inc.*, 330 NLRB 1252, 1257 (2000) (employer threatens an employee in violation of the Act when it predicts that employees will lose benefits in negotiations if they select a union). The Respondent here has articulated no objective basis for Krzywda's prediction that employees would lose benefits as a result of collective bargaining, and therefore her statement constitutes a coercive threat, not a lawful prediction.

For the reasons discussed above, I find that the statements Krzywda made during her April 16, 2000, conversation with Mashrick violated Section 8(a)(1) by threatening that employees would lose employment and benefits if they selected the Union as their collective-bargaining representative.

The final allegation arising out of the meeting between Krzywda and Mashrick is that Krzywda implied it would be futile for employees to select the Union as their collective-bargaining representative. During the meeting, Krzywda told Mashrick that "just because a union comes in . . . doesn't mean . . . that we would go to the table at all." She added that the

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[19] In its brief, the Respondent answers the allegation that it unlawfully threatened loss of benefits in part by citing Section 8(c) of the Act, which protects an employer's right to communicate its views to employees. In *Gissel*, the Supreme Court considered Section 8(c), but concluded that an employer's predictions that unionization will result in negative consequences are protected by that section only if the predictions are "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." 395 U.S. at 617 and 618.

Respondent "might not even go to the table." I find that this statement is unlawful because it implies that voting for union representation would be futile insofar as the employees could not use the election process to force the Respondent to recognize and bargain with the Union. See *Equipment Trucking Co., Inc.*, 336 NLRB 277, 283 (2001) (company unlawfully threatened futility when it told employees that the company would never negotiate a contract); *Outboard Marine Corp.*, 307 NLRB 1333, 1335 (1992) (same), enfd. 9 F.3d 113 (7th Cir. 1993) (Table); *Airtex*, 308 NLRB 1135 fn.2 (1992) (employer unlawfully threatened futility by stating that it only had to negotiate with the union, not sign a contract). The threatening character of Krzywda's statements implying futility is exacerbated because those statements came in the context of a rather lengthy meeting during which Krzywda also coercively interrogated Mashrick and threatened her with loss of employment and benefits. See *Venture Industries*, 330 NLRB 1133 (2000) (statement of futility was made during a lengthy conversation that also included threats of the loss of jobs and opportunities and this context added to threatening nature of the statement of futility). I believe that Krzywda's statements unlawfully implied futility despite the fact that she did not unequivocally state that the Respondent would not bargain, but rather that it "might not." Krzywda's statement implies that the election effort was futile since, regardless of the results of that election, the Respondent would be the one who decided whether employees bargained collectively. See also *Roma Baking Company*, 263 NLRB 24, 30-31 (1982) (employer unlawfully implied futility when it stated that organizing campaign "might not" reach the voting stage and that it "could" close the facility).

For these reasons, I conclude that the Respondent violated Section 8(a)(1) by implying that it would be futile for employees to select the Union as their collective-bargaining representative.

O'Brien

The complaint alleges that O'Brien, a supervisor, violated Section 8(a)(1) in April 2000 by threatening employees with loss of benefits if they voted for the Union.[20] The only statements by O'Brien that appear in the record are those testified to by Foxworth, and so I assume that this allegation relates to those statements. O'Brien told Foxworth that if the Union won the election, employees were "definitely going to lose something" during negotiations, and that the Respondent was "not going to give you what you want without taking something away." During this same conversation, O'Brien listed a number of benefits that employees could lose. The language used by O'Brien is very similar to some of that used by Krzywda, and which I have already found to be unlawful. As in the case of Krzywda's statements, O'Brien's prediction that employees would necessarily lose some benefits if they selected a union was not supported by a "lawful explanation based on objective facts as to why such a loss of benefits would occur." *Poly-America, Inc.*, 328 NLRB at 669; see also *Dico Tire, Inc.*, 330 NLRB at 1257. Since the Respondent has articulated no objective basis for O'Brien's prediction that employees would necessarily lose some benefits as a result of collective bargaining, her statement constitutes a coercive threat, not a lawful prediction, under applicable precedent.

I find that the statements O'Brien made during her April 2000, conversation with Foxworth violated Section 8(a)(1) by threatening that employees would lose benefits if they voted for the Union.

Statement Regarding "Frozen Benefits"

[20] The Respondent admits that O'Brien is its agent, and a supervisor within the meaning of Section 2(11).

The General Counsel alleges that the Respondent threatened loss of benefits by distributing a pamphlet on or about April 27, which stated that during initial collective bargaining wage and benefit programs typically remain "frozen" and employees would have to "wait and see" whether wages and benefits would be "changed, if *at all* by a contract."

When evaluating whether an employers' statement that wages and benefits will be frozen during initial bargaining conveys an unlawful threat, the Board has looked to the surrounding circumstances. In *Teksid Aluminum Foundry*, 311 NLRB 711, n.2 and 717 (1993), the Board considered an employer's statement that if the union won the election wages and benefits would be frozen until an agreement was reached. In that case, the language was found to violate the Act because employees "reasonably could infer from the language used that step increases were frozen indefinitely in the event they chose to be represented by the Union." Id. at 717. The decision was also based on the fact that the employer had posted the at-issue language shortly before the representation election was to be held, so that the union did not have a reasonable opportunity to respond. Id. Similarly, in *Frank's Nursery & Crafts*, 297 NLRB 781, 785 (1990), an employer's statement that wages would be frozen was found to be unlawful because it indicated that employees would not receive periodic merit wage increases that were an existing term and condition of their employment. On the other hand, in *Mantrose-Haeuser Co.*, 306 NLRB 377, 377-78 (1992) the Board held that language virtually identical to that used by the Respondent in this case could not reasonably be read as a threat that regular wage increases and bonuses would be lost since the Respondent had continued making the regular wage increases during the campaign and had assured employees that the past practices of granting merit increases and other benefits would continue.

Under the circumstances present here, I conclude that the Respondent's statement that wages and benefits typically would be "frozen" during initial bargaining was an unlawful threat. The Respondent's employee handbook states that "[a]s a general rule, Performance Evaluations are conducted and resultant pay increases are granted once during a fiscal year." GC Exh. 4.[21] The Respondent does not claim, and the evidence does not show, that it told employees that the "freeze" would not prevent these periodic wage increases that were an existing term and condition of employment with the Respondent. Employees could reasonably infer from the language used that the periodic wage increases they would otherwise receive would be frozen indefinitely if the Union won the election. Unlike in *Mantrose-Haeuser Co.*, a decision upon which the Respondent relies, management in this case did not do anything to dispel that inference. To the contrary, as in *Teksid Aluminum*, the Respondent disseminated its statement about "frozen" wages very close in time to the election, thereby depriving employees' of a chance to determine, prior to voting, what effect a freeze would have on established, periodic, raises. Furthermore, in *Mantrose-Haeuser*, the Board supported its conclusion that language like that at-issue here was lawful by observing that "there were no other allegations of unfair labor practices or objectionable conduct." 306 NLRB at 377. Conversely, the fact that the Respondent made the statement about frozen wages during a period when it committed multiple unfair labor practices, including threatening employees with loss of benefits, increases the likelihood that employees would reasonably understand the Respondent's statement about frozen wages to be a threat.

For these reasons, I find that the Respondent violated Section 8(a)(1) when, on or about

[21] In the decision on the election objections, the hearing officer found that these wage increases historically occurred during the fall. GC Exh. 2 at Pages 18-20.

April 27, 2000, it distributed a pamphlet that contained language threatening that employees would lose wages and/or other benefits if they selected the Union as their collective-bargaining representative.

Solicitation/Distribution Policy

The General Counsel alleges that the following portion of the Respondent's policy regarding solicitation and distribution is overly broad and a violation of the Section 8(a)(1): "Solicitation and distribution to patients and visitors is prohibited at all times. Employees who participate in unauthorized solicitations or distributions are subject for [sic] disciplinary action." For the reasons discussed below, I agree that the policy is unlawful.

In recognition of the fact that a hospital's primary function "is patient care and that a tranquil atmosphere is essential to carrying out that function," the Board has permitted health care facilities to impose somewhat more "stringent prohibitions" on solicitation and distribution than are generally permitted.[22] *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1997); see also *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (approving the standard applied by the Board in *St. John's Hospital*). A hospital may prohibit solicitation and distribution at any time in immediate patient care areas (such patients' rooms, operating rooms, x-ray areas, therapy areas), even during non-working time. *St. John's Hospital*, 222 NLRB at 1150-51; see also *Health Care & Retirement Corp.*, 310 NLRB 1002, 1004-05 (1993). However, a hospital may not ban solicitation and distribution in other areas to which patients and visitors have access (such as lounges and cafeterias) unless the evidence shows that such a ban is necessary to avoid a disruption of patient care. Id.; *NLRB v. Baptist Hospital*, 442 U.S. 773, 781-787(1979).

In this case, the Respondent does not limit the prohibition on solicitation and distribution to immediate patient care areas. In fact, the Respondent's rule is so broad as to prohibit employees from petitioning public support regardless of where or when such activity occurs. The policy, on its face, would apply to locations outside, and even distant from, the hospital. Therefore, the rule is invalid unless the Respondent can show that it is necessary to avoid a disruption of patient care. Here, the Respondent has produced no evidence showing that such an unqualified ban on solicitation and distribution is necessary to avoid a disruption of patient care.[23] Therefore, the Respondent's rule is overbroad and unlawful.

The Respondent contends that its rule is permissible because employees only have the right to solicit and distribute to "other employees, not clients of the institution." It is unsurprising that the Respondent cites no authority for this proposition since it is contrary to applicable law. In *UCSF Stanford Health Care*, 335 NLRB 488, 535-36 (2001), enfd. 325 F.3d 334 (D.C. Cir. 2001), cert. denied, 2004 WL 46646 (Jan. 12, 2004), the Board affirmed that a hospital violated

[22] Under the standards applicable to non-hospital employers, a policy against solicitation violates the Act when it prohibits employees from engaging in union solicitation during non-work times, such as breaks and meals. *M.J. Mechanical Services*, 324 NLRB 812, 813 (1997). A non-hospital employer's policy against distribution of literature is generally unlawful when it prohibits employees from distributing union literature during non-working time in non-work areas. *Stoddard-Quirk Manufacturing, Co.*, 138 NLRB 615 (1962).

[23] The Respondent conjures the image of pro-union employees accosting patients who are entering the hospital in need of medical attention. However, the Respondent's policy of prohibiting solicitation of patients and visitors at all times and in all places is far broader than is necessary to address any concerns of this type.

the Act when it maintained a policy that prohibited solicitation and distribution to *nonemployees*. The United States Court of Appeals for the D.C. Circuit upheld the Board's decision, stating:

> [N]either this court nor the Board has ever drawn a substantive distinction between solicitation of fellow employees and solicitation of nonemployees. To the contrary, both we and the Board have made clear that [National Labor Relations Act] sections 7 and 8(a)(1) protect employee rights to seek support from nonemployees.

Stanford Hospital and Clinics v. NLRB, 325 F.3d 334, 343 (D.C. Cir. 2001). Similarly, in *NCR Corp.*, 313 NLRB 574, 576 (1993), the Board stated that "Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations" by distributing union literature to them. See also *Santa Fe Hotel & Casino*, 331 NLRB 723, 730 (2000) ("[T]he fact that off-duty employee distributions . . . were to customers rather than to other employees . . . is an irrelevant consideration.") Therefore, the Respondent's argument based on the nonemployee status of patients and visitors fails.

The Respondent also argues a violation should not be found because the handbook contains language indicating that it only "summarizes" the rules applicable to employees. This argument is utterly frivolous. The Respondent does not even claim that there exists an "unabridged" version of its solicitation/distribution policy much less venture to say how its meaning diverges from that of the rule published to employees, or explain why any such differences would render the policy lawful.[24] Even assuming that the unlawful version of the rule that the Respondent provided to employees is not complete, the fact would remain that it was the version the Respondent chose to provide to employees and that it would tend to chill protected activity. At any rate, to the extent that one accepts that the Respondent left the precise contours of the rule ambiguous, the Board has held that such ambiguity is to be construed against the promulgator of the rule. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999) (Table); *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

For the reasons discussed above, I conclude that the Respondent's rule prohibiting solicitation and distribution to patients and visitors is overbroad and violates Section 8(a)(1) of the Act.[25]

Confidentiality Policy

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[24] The Respondent cites *Mediaone of Greater Florida, Inc.*, 340 NLRB No. 39 (2003), in which the Board evaluated the legitimacy of an employer's no-solicitation rule by considering two expressions of that rule (one a summary and one complete), both of which were provided to employees in a single employee handbook. That decision is inapplicable here since, during the relevant time period, the Respondent's employee handbook only provided one version of its solicitation/distribution policy, the unlawful one discussed above.

[25] The second sentence of the challenged paragraph states that employees who participate in "unauthorized" solicitations or distributions may be disciplined. To the extent that this might suggest that the Respondent's policy permits soliciting and distributing to patients and visitors as long as the Respondent's prior authorization is obtained, that does not alter my conclusion that the policy is unlawful. The Board has held that "any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful." *Brunswick Corp.*, 282 NLRB 794, 795 (1987).

Up until June 30, 2003, the Respondent maintained a confidentiality policy that stated:

> Disclosure of confidential information gained through your employment by the Hospital is considered an act of prohibited conduct subject to formal disciplinary action. Any information concerning a patient's illness, family, financial condition or personal characteristics is strictly confidential. When a patient's history or condition is reviewed, it must be done in privacy with only those persons involved with the care of the patient. Any other information coming to you in the course of your employment concerning another person or employee is also considered confidential and may not become the topic of conversation with others.

The General Counsel alleges that the Respondent's maintenance of this policy violates Section 8(a)(1) of the Act.

In determining whether the maintenance of a confidentiality policy violates Section 8(a)(1) of the Act "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *University Medical Center*, 335 NLRB 1318,1320 (2001), enf. denied in relevant part 335 F.3d 1079 (D.C. Cir. 2003). In cases involving policies that prohibit disclosure of employee information, the inquiry has turned on whether the rule "could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment." See, e.g., Id. at 1322; *Lafayette Park Hotel*, 326 NLRB at 826. Depending on the language of the particular policy, the Board has found either that the restriction did prohibit such activity, see *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn.3 and 291 (1999), *University Medical Center*, 335 NLRB at 1322, or that it did not, see *Mediaone of Greater Florida*, 340 NLRB No. 39, slip op. at 2-3, *Lafayette Park Hotel*, 326 NLRB at 826. "Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." *Lafayette Park Hotel*, 326 NLRB at 825.

I conclude that employees would reasonably read the confidentiality policy as prohibiting them from discussing information concerning terms and conditions of employment. The language that the Respondent chose for the provision is unusually broad. The policy does not limit the prohibited disclosures to the types of information typically considered "confidential," but rather goes out of its way to redefine confidential in the broadest terms. It states that confidential information includes "*any* information" about another employee "coming to" an employee in "the course" of their employment. "Any information," on its face includes information about employee wages and other terms and conditions of employment. The Respondent also fails to limit what is meant by information "coming to" employees "in the course of their employment." Thus, the category of information coming to employees in the course of their employment would include, for example, information that co-workers voluntarily divulged to each other during working hours about their own wages and benefits.

For these reasons, I find that the version of the Respondent's confidentiality policy regarding employee information that was maintained until June 30, 2002, is overly broad and a violation of Section 8(a)(1) of the Act.

On June 30, 2002, the Respondent modified the confidentiality policy by adding the following language: "This Confidentiality Information Policy should not be interpreted to prohibit employees from discussing the terms and conditions of their employment in an appropriate manner." The General Counsel argues that the policy is unlawful even as modified because the phrase "appropriate manner" is ambiguous and will leave employees "with the choice of either

guessing what the employer would find appropriate or playing it safe by not discussing terms and conditions of employment at all." I disagree. With the modification, I believe that reasonable employees would understand the employer's confidentiality policy as permitting the type of discussions regarding terms and conditions of employment that are protected by Section 7. The Board itself has used the term "appropriate manner" to describe the types of concerted or union activity with which employers may not interfere. In one case the Board stated than an employer's action violated Section 8(a)(1) "because it was meant to inhibit [the employee's] protected right to criticize management . . . in *an appropriate manner* in support of a union organizational drive." *Lancaster Fairfield Community Hosp.*, 311 NLRB 401, 403 (1993) (emphasis added). In another case, the Board affirmed the administrative law judge's conclusion that an employer violated Section 8(a)(1) by denying union organizers who behaved in an "appropriate manner" access to a cafeteria that was open to the public. *Southern Maryland Hosp.*, 293 NLRB 1209,1216 (1989), enf. granted in part and denied in part 916 F.2d 932 (4th Cir. 1990).

For the reasons discussed above, I conclude the complaint paragraph that alleges a violation based on the version of the confidentiality policy that the Respondent adopted on June 30, 2003, should be dismissed.

III. Suspension of Foxworth

The General Counsel alleges that the Respondent discriminated in violation of Section 8(a)(1) and (3) when it suspended Foxworth for 3 days in June 2000. In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the Board set forth the standards for determining whether an employer has discriminated against an employee on the basis of union or protected activity. Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent's actions were motivated, at least in part, by anti-union considerations. The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Senior Citizens*, 330 NLRB at 1105. The Respondent cannot meet its *Wright Line* burden merely by showing that employee misconduct also factored into the Respondent's decision. Rather, the Respondent must show that the misconduct would have resulted in the same discipline even in the absence of the employee's union and protected activities. *Monroe Manufacturing*, 323 NLRB 24, 27 (1997).

Under the standards stated above, I conclude that the General Counsel has met its initial burden. The evidence shows that Foxworth was one of the Union's most active and open supporters and that Orlandi was aware of Foxworth's prounion sympathies and activities when she decided to suspend him. As shown by the violations found above, the Respondent bears anti-union animus and has demonstrated a willingness to act unlawfully in its campaign to defeat the organizational effort.

Since the General Counsel has made the required initial showing, the burden shifts to the Respondent under *Wright Line*, supra, to show that it would have taken the same actions even in the absence of Foxworth's protected activities. The Respondent argues that regardless of Foxworth's union activities, it would have suspended him because of the threats that Olivier reported that Foxworth had made near the elevator and outside the cafeteria. Regarding the

elevator incident, I do not believe that Orlandi would have accepted Olivier's highly implausible account if not for the fact that Foxworth was an active union supporter. Olivier claimed he heard what Foxworth said even after the doors to the elevator had closed and the elevator started away. It is implausible that from outside the elevator Olivier would be able to hear something said inside the elevator at that time, much less that he would be able to discern the exact words spoken and the identity of the speaker. Nevertheless, Orlandi decided to accept Olivier's facially implausible account of the elevator incident without giving Foxworth any opportunity to respond to the allegation or tell his side of the story. When questioned about her failure to discuss the incident with Foxworth before suspending him, Orlandi simply stated that she did not believe doing so was necessary. Although Orlandi did not believe it was worth the trouble to question Foxworth about this allegation against him, she did make the effort to discuss the allegation with Durkey, a personal friend of Olivier's. An employer's failure to conduct a meaningful investigation of alleged wrongdoing by an employee and its failure to give the employee an opportunity to explain are indicia of discriminatory intent. *New Orleans Cold Storage & Warehouse Co.,* 326 NLRB 1471, 1477 (1998), enfd. 201 F.3d 592 (5th Cir. 2000). The way Orlandi conducted the investigation of the elevator incident, and especially her failure to allow Foxworth any opportunity to clear his name, shows such bias.

Orlandi also showed obvious bias in her investigation of the exchange that Foxworth and Olivier had near the cafeteria. In that instance, Orlandi did interview Foxworth, and Foxworth categorically denied threatening Olivier. Orlandi questioned the two individuals, other than Olivier and Foxworth, who were witnesses to the incident, and both of those individuals essentially corroborated Foxworth's account of what he said. Neither corroborated Olivier's claim that Foxworth said "You're going to get it," nor did either report that Foxworth had made a threat of any kind. Orlandi also received a copy of the police report that Olivier had filed regarding the cafeteria incident. Even that report essentially corroborated Foxworth's account of what was said, and contradicted Olivier's. Orlandi's decision to credit Olivier's account despite the clearly contrary evidence generated by her own investigation shows obvious bias.

The bias in Orlandi's investigation is even clearer when one considers how differently she treated the allegation made against Olivier -- an active opponent of the Union. Foxworth gave Orlandi the names of two individuals who he said had heard Olivier make threats against him. Orlandi responded by demanding that Foxworth put his allegation in writing and then concluded that there was "no validity" to the allegation without ever interviewing either of the witnesses. On the other hand, when Olivier alleged that Foxworth had made threats, Orlandi did not require him to submit his allegation in writing, and she was quick to conclude that the claim had validity even though the two witnesses she interviewed, as well as the police report, failed to corroborate Olivier's account.

The timing of Foxworth's suspension is a further cause to suspect the Respondent's motives. See *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 (2000) (timing is an important factor in assessing motivation in cases alleging discriminatory discipline based on union or protected activity); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000) (same); *American Wire Products*, 313 NLRB 989, 994 (1994) (same). After the election, Foxworth, along with a number of other employees, signed an open letter urging employees to come forward with bases for objecting to the election. The Respondent suspended Foxworth on June 9 -- only 5 days before the objections hearing at which Foxworth testified on behalf of the Union.[26] The suspension continued through the first day of Foxworth's testimony. During the

[26] In its Brief, the Respondent asserts that when Orlandi took the disciplinary action she did not know that Foxworth would be testifying at the hearing. Respondent's Brief at 10 and 33.

Continued

objections hearing, the Respondent's counsel elicited testimony about the recently imposed suspension in an effort to undermine Foxworth's credibility. This timing gives me further cause to believe that the disciplinary action against Foxworth would not have been taken absent the Respondent's antiunion animus and desire to discourage employees from supporting the Union.

The Respondent presented evidence regarding other employees who it disciplined in an effort to show that it treated Foxworth the same as others who threatened co-workers. That evidence is largely besides the point since, as discussed above, the Respondent did not have a legitimate, nondiscriminatory, basis for believing that Foxworth had threatened Olivier. Even if one considers the evidence of comparators, it does little to further the Respondent's case, and certainly falls far short of outweighing the evidence that the suspension resulted from unlawful discrimination. The comparator evidence showed that Orlandi sometimes addressed conflicts by assisting the employees in ironing out their differences, without disciplining anyone. The record also shows that four of the comparators presented by the Respondent received discipline comparable to Foxworth's only after having prior conduct or performance problems. In only three instances was there sufficient evidence to show that a co-worker had received a 3-day suspension for misconduct that was arguably comparable to that attributed to Foxworth.

The Respondent argues that Foxworth exaggerated his importance in the Union campaign. According to the Respondent, Foxworth was just one of dozens of union supporters, and its lack of discriminatory motive is demonstrated by the fact that it did not discipline any of the others. Respondent's Brief at 33-34. The Respondent's assertion that Foxworth overstated his involvement in the union campaign is made without any citation to record evidence. Indeed, there was no testimony or other evidence contrary to Foxworth's testimony that he, inter alia: was designated by the Union as an observer at the April 27 election; served as a informal liaison between employees and the Union; and had his picture and name featured on pro-union materials distributed to employees. Therefore, I reject the Respondent's contention that Foxworth was not a particularly active union supporter. At any rate, even if the Respondent could prove that it did not discipline other employees who supported the Union as actively as Foxworth had, that would not forgive the discriminatory discipline it imposed on Foxworth. See, e.g., *McGaw of Puerto Rico*, 322 NLRB 438, 451 (1996) (layoff of union leaders unlawful even though union leaders from other departments were not laid off), enfd. 135 F.3d 1 (1st Cir. 1997), nor would it show that the Respondent would have refrained from discriminatorily disciplining other active union supporters given some pretense for doing so.

The Respondent warns that it is not the Board's role to "substitute its judgment for that of an employer in deciding what would have been appropriate discipline." Respondent's Brief at 34, citing *Guardian Automotive Trim*, 340 NLRB No. 63 (2003) and *Detroit Paneling Systems*, supra. I agree, but "'[w]hile it is a truism that management makes management decisions, not the Board , . . . it remains the Board's role, subject to deferential review, to determine whether management's proffered reasons were its actual ones.'" D*etroit Paneling Systems,* 330 NLRB at 1170, quoting *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998). Given the evidence in this case, especially the blatant bias in the way the Respondent's investigation was conducted, I conclude that management's proffered reasons are pretextual.

For the reasons discussed above, I find that the Respondent violated Section 8(a)(1)

The Respondent provides no record citation to support this contention. In fact, Orlandi's testimony was that she was "not sure" if she knew about the scheduled objections hearing at the time she suspended Foxworth. Tr. 146.

and (3) of the Act in June 2000 by discriminatorily suspending employee Willie Foxworth because he assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent interfered with employees' exercise of Section 7 rights in violation of Section 8(a)(1) of the Act: in April 2000, by engaging in unlawful surveillance of union activities; on April 16, 2000, by unlawfully interrogating an employee about her union sympathies; on April 16, 2000, by unlawfully threatening that employees would lose employment if they selected the Union as their collective bargaining representative; on April 16, 2000, by implying that it would be futile for employees to select the Union as their collective bargaining representative; on two occasions in April 2000, by threatening that employees would lose benefits if they selected the Union as their collective-bargaining representative; on or about April 27, 2000, by distributing a pamphlet to employees which contained language threatening that employees would lose wages and/or other benefits if they selected the Union as their collective-bargaining representative; by maintaining an overly broad rule prohibiting solicitation and distribution to patients and visitors; by maintaining an overly broad confidentiality rule regarding employees' use of information about other employees.

4. The Respondent violated Section 8(a)(1) and (3) of the Act in June 2000 by discriminatorily suspending employee Willie Foxworth because he assisted the Union and engaged in concerted activities and to discourage employees from engaging in such activities.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In addition to the usual cease-and-desist order and other affirmative relief, I recommend that the Respondent be ordered to make Willie Foxworth whole for any loss of earnings and other benefits he suffered as a result of his unlawful suspension. The backpay is to be computed in accordance with *F.W. Woolworth, Co.*, 90 NLRB 289 (1950) with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As discussed above, I find that the Respondent's confidentiality rule, as amended on June 30, 2003, no longer offends the Act. This should not, however, be construed as a finding that the Respondent has adequately remedied the violation based on the earlier, unlawful, language, or that the Respondent has been in compliance with the Act since June 30, 2003. The fact that an employer has corrected an unlawful rule is insufficient to escape liability unless there is adequate publication of the change and assurances to employees that the employer will not violate the Act. See *Electrical Workers Local 3 (Fairfield Electric)*, 331 NLRB 1498, 1500 (2000). The record in this case does not show whether, after June 30, 2003, copies of the handbook distributed to new employees, and maintained in supervisors' offices, incorporated the change, or provided notice of it. Nor does the record show that the Respondent assured employees that there would be no future interference with their Section 7 rights. The same is true with respect to the June 30, 2003, amendment that deleted offending language from the

handbook provision on solicitation and distribution. For these reasons, I will recommend that the Respondent be required to rescind the unlawful provisions and post an appropriate remedial notice. See *Elevator Constructors, Local 2 (Unitec Elevator Services)*, 339 NLRB No. 114, slip op. at 4 (2003) (Although employer repealed unlawful provision, it is required to rescind the provision again and post an appropriate notice, since it did not "repudiate its unlawful conduct in a timely, unambiguous, and specific fashion, nor did it assure its members there would be no future interference with their Section 7 rights.").

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[27]

ORDER

The Respondent, The Carney Hospital, Inc., Dorchester, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) The surveillance of its employees' union and other protected concerted activities.

(b) Coercively interrogating any employee about union support or other protected activities.

(c) Threatening that employees will lose employment if they select a union as their collective-bargaining representative.

(d) Implying to employees that it will be futile to select a collective-bargaining representative.

(e) Threatening that employees will lose benefits if they select a union as their collective-bargaining representative.

(f) Distributing to employees any written materials which threaten that employees will lose wages and/or other benefits if they select a union as their collective-bargaining representative.

(g) Maintaining any overly broad rule prohibiting solicitation and distribution.

(h) Maintaining any overly broad confidentiality rule.

(i) Suspending or otherwise discriminating against any employee for supporting a union or engaging in other protected activity.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, notify all employees that the paragraph in the Respondent's employee handbook that prohibits solicitation and distribution to patients and visitors at all times is rescinded, void, of no effect and will not be enforced.

(b) Within 14 days from the date of this Order, notify all employees that the version of the confidentiality rule that was contained in the Respondent's employee handbook prior to June 30, 2003, is rescinded, void, of no effect and will not be enforced. Further notify all employees that the Respondent will not prohibit employees from discussing the terms and conditions of their employment in a manner protected by the Act.

(c) Make Willie Foxworth whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to Foxworth's unlawful suspension, and within 3 days thereafter notify him that this has been done and that the suspension will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Dorchester, Massachusetts, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2000.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[28] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. January 21, 2004

PAUL BOGAS
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT engage in surveillance of your union and other protected concerted activities.

WE WILL NOT coercively interrogate you about union support or other protected activities.

WE WILL NOT threaten that you will lose employment if employees select a union as collective-bargaining representative.

WE WILL NOT imply to you that it will be futile to select a collective-bargaining representative.

WE WILL NOT threaten that you will lose benefits if employees select a union as collective-bargaining representative.

WE WILL NOT distribute any written materials which threaten that you will lose wages and/or other benefits if employees select a union as collective-bargaining representative.

WE WILL NOT maintain any overly broad rule prohibiting solicitation and distribution.

WE WILL NOT maintain any overly broad confidentiality rule.

WE WILL NOT interfere with your right to discuss the terms and conditions of your employment in a manner protected by the National Labor Relations Act.

WE WILL NOT suspend or otherwise discriminate against any employee for supporting a union or engaging in other protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, notify you that the paragraph in the employee handbook that prohibits solicitation and distribution to patients and visitors at all times is rescinded, void, of no effect and will not be enforced.

WE WILL, within 14 days from the date of the Board's Order, notify you that the version of the confidentiality rule that was contained in the Respondent's employee handbook prior to June 30,

2003, is rescinded, void, of no effect and will not be enforced.

WE WILL make Willie Foxworth whole for any loss of earnings and other benefits suffered as a result of our discrimination against him.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Foxworth's unlawful suspension, and within 3 days thereafter notify him that this has been done and that the suspension will not be used against him in any way.

THE CARNEY HOSPITAL, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Boston, MA 02222–1072

(617) 565-6700, Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6701.